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MICHAEL RODAK, JR., CLERK

No. 72-315

In the

Supreme Court of the United States

OCTOBER TERM, 1972

NEW YORK CENTRAL RAILROAD,

Petitioner,

vs.

JO ANN RAINES, as Special Administrator of the Estate of Thomas Raines,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE RESPONDENTS' STATEMENTS THAT THE RAILROAD WAIVED THE RIGHT TO COMPLAIN ABOUT THE EVIDENCE OF NEVER ENDING INFLATION IS NOT TRUE.

A. The Railroad Did Object And Was Given A Continuing Objection To Testimony Of Continuing Inflation.

In the first paragraph on page 4 of the Brief in Opposition to Petition for Writ of Certiorari, respondent charges that the testimony of the economist offered by it was not objected to by petitioner. This assertion is untrue. At pages 360-361 of the Record the objection to the improper evidence is demonstrated, together with the deep reservations of the trial court judge in permitting the admission of such evidence at all:

360 Mr. Dooley: The only thing that I am going to ask him is this question: Whether in his opinion, this particular inflationary spiral that we are in will continue. I'm not going to ask him how long or anything else.

Mr. Domash: Then, what relevancy does it have on the case? You have to know how long because the jury is going to be asked—

The Court: You can cross examine. You can get McChesney and get depression is coming and so forth.

Mr. Domash: The Jury is going to be asked to evaluate this man's lost earnings over his life expectancy, isn't that right, forty-two point eight years?

Mr. Dooley: Yes.

Mr. Domash: So, you are just saying what's going to happen in the future. Well, you have got to be more definite than that. You just can't say not for how long. Your witness—

The Court: Nobody can really tell.

Mr. Domash: And, that's why this is highly speculative.

361 Sure, for a year or two, you might be able to have some—

The Court: You say this has been allowed? You assure me of this?

Mr. Dooley: Yes.

The Court: On your assurance, Jim, I'm going to take it. You are asking an economist. I couldn't project.

Mr. Dooley: I'm just given you the actual testimony. I'm not going to get into this—

The Court: I'm not going to send these into the Jury room with them because you will have them in there for six years and they will go all cockeyed.

Mr. Domash: Judge, in order that we might not interrupt and so that we will proceed in an orderly fashion, May we have a continuing objection to all of these questions and also to the exhibits? What are their numbers, Jim?

Mr. Dooley: 92, 93, 94, 95 and 96.

The Court: When he offers them I'll say "over objection."

B. The Post-Trial Motion Did Object To The Speculative Testimony Of The Economist.

Respondent then charges in the last sentence of the same paragraph on page 4 that petitioner failed to complain of the objected testimony in its post-trial motion. This charge too is false. The objection was made as follows at page 147 of the Record:

> "11. The Court erred in admitting, over the objection of the defendant, the testimony of economist Dr. Henderson, on the grounds that said testimony was immaterial, irrelevant, highly prejudicial to the defendant, and pure speculation and conjecture, not being based on admitted or admissible facts."

It was also objected to in paragraphs 12 and 13 of the post-trial motion (R. 147-148).

C. The Railroad Did Not Introduce Any Speculative Testimony Of Inflation And Did Not Waive Its Objection To Its Admissibility.

At the bottom of page 4 of the Brief in Opposition to Petition for Writ of Certiorari, respondent charges that petitioner also introduced evidence of which it now com-

plains. The difficulty with this argument is twofold. First, it is false—petitioner introduced no evidence based upon speculation or conjecture. The evidence offered merely showed the then cost of purchasing an annuity. Second, the statement concedes that the evidence introduced by respondent was in fact improper and prejudicial as petitioner contends.

Predicting the future is necessarily speculative and conjectural and therefore inconsistent with the process of litigation which demands that verdicts be based on conclusions drawn from facts testified to in open court. As stated in *Sleeman* v. *Chesapeake & Ohio Ry.*, 414 F2d 305 (CA6, 1969) at 308:

> "Of course, the nation's economic history since the 1930's would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial."

The speculative, conjectural and totally improper nature of the objected testimony is demonstrated dramatically in the single statement of the plaintiff's economist, John P. Henderson, at page 448 of the Record:

> "If I were a betting man, I would bet that there will be a formal deflation of the dollar after the 1968 election."

The same waiver arguments now advanced by respondent were made and rejected by the Illinois Appellate

Court and the Illinois Supreme Court. Both courts ruled on the merits because there was no waiver.

CONCLUSION

Contrary to respondents' statements, the cases are in conflict on:

1. the admissibility into evidence of Railroad Retirement Benefits;

2. instructing the jury that its award is not subject to income tax; and

3. allowing the jury to hear evidence of inflation.

This Court should grant the writ.

Respectfully submitted,

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